United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-[redacted] 1983

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. RUDOLPH SMALLWOOD, Petitioner-Appellant, -against- THE HONORABLE J. E. LAVALLE, Superintendent of Clinton Correctional Facility, Dannemora, Respondent-Appellee.	Docket No. [redacted] 74-1983

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

WHETHER THE TOTAL EXCLUSION OF THE PUBLIC FROM THE COURTROOM WAS A VIOLATION OF THE SIXTH AMENDMENT.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Edward R. Neaher) dated May 30, 1974, denying without a hearing a petition for writ of habeas corpus. The District Court granted a certificate and leave to appeal in forma pauperis.

This Court assigned The Legal Aid Society Federal Defender Services Unit as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

Appellant was convicted, after a trial before a jury in the Supreme Court of the State of New York, Kings County, of manslaughter in the first degree. On August 20, 1970, appellant was sentenced to imprisonment for a term not to exceed eight years.

The Second Judicial Department of the Appellate Division unanimously affirmed the conviction without opinion. People v. Smallwood, 329 N.Y.S. 2d 1010 (February 7, 1972).

The New York Court of Appeals, after granting leave to appeal, also unanimously affirmed the conviction without opinion. People v. Smallwood, 31 N.Y. 2d 750 (November 2, 1972).

At his trial, appellant objected to the exclusion of the public from the courtroom during the testimony of the key witness for the State, a young woman who observed the killing from her apartment window. This issue was also raised on appeal to the state appellate courts.

In his petition for writ of habeas corpus, appellant raises the same question.

B. The Trial

Appellant was charged with the manslaughter killing of one Mickey Johnson during the early morning hours of September 29, 1968, in Brooklyn. The State sought to prove that appellant slew Johnson with a shotgun blast following heated arguments over a card game at a party on the night of September 28.

The primary witness for the State was Mary Ann Boyd, who was awakened by the noise of the shotgun, ran to her window, and allegedly observed appellant, with whom she was familiar, standing over the decedent's body with the shotgun in his hand.

Just prior to Boyd's testimony, the Assistant District Attorney, out of the hearing of the jury, requested that all spectators be cleared from the courtroom. The following colloquy was then had among Assistant District Attorney Schmier, defense counsel, Mr. Kaplan, and the judge:

> MR. SCHMIER: My next witness is certified by me and my experience as a lawyer as the principal witness of the case, an eyewitness to the murder, the only eyewitness to the murder.
>
> She has told me many times, which I have not reported to the Court--
>
> THE COURT: How old is this witness?
>
> MR. SCHMIER: She is fifteen -- she was fifteen at the time of the crime. She may now be sixteen.
>
> We have had innumerable talks with her in which each one has been difficult because she is afraid. She lives on the very block with the defendant. She has been spoken to by the defendant. The defendant's friends -- we are not claiming that they threatened her or anything like that, but they consistently said, "You are going to hurt our friend."
>
> Now she is here. We have secreted her in the back away from the public, which is our prerogative.

She has used the private bathroom. The girl is four months pregnant. Her mother said that she was not going to have her testify because the girl could lose the baby. I assured her she would be given the highest consideration and treatment in the interest of justice, and one of the rare times I am doing -- I am imploring the Court to clear the courtroom while she testifies, because there are friends of the defendant in the courtroom, and she is afraid to testify in front of them.

THE COURT: What do you say Mr. Kaplan?

MR. KAPLAN: Judge, I would have to object to this because I maintain this is an open forum. I never heard anything about any threats or anything, as far as that goes.

THE COURT: Let the record show that presently seated in the spectator section of the courtroom are six people. Three of these are colored. One of the persons I recognize as a regular court onlooker. The others we don't know about.

Let the record also show there's no one else in the courtroom.

MR. SCHMIER: Judge, I hate to interrupt you. The colored man sitting in the courtroom, you may not recognize him, but you gave him permission yesterday to talk to the defendant.

MR. KAPLAN: I admit--

THE COURT: The Court will exercise its discretion and ask all spectators to leave the courtroom while this witness testifies.

You have an exception.

MR. KAPLAN: Thank you.

THE COURT: Clear the courtroom.

(All spectators leave the courtroom)

(Trial transcript at 74-76)

Thus, the trial judge ordered the six spectators to leave the courtroom without inquiring into the reasonableness of Boyd's fears, or even whether any of the spectators were known to Boyd. The only relevant fact established was that appellant knew only two of the spectators.

Following the exclusion, Boyd's testimony, and evidence of appellant's altercation with Johnson on the night of September 28, appellant sought to establish that he was not the person who killed Johnson. Appellant maintained that after the party he passed the early morning hours of September 29 at a friend's house and returned home at 7 a.m., when he found Johnson's body near his (appellant's) home. Similar evidence was given by three companions with whom appellant allegedly spent the time between the party and his return home.

At the conclusion of the trial, appellant was convicted. On appeal to the Appellate Division, Second Judicial Department, and the Court of Appeals, both courts affirmed the conviction without opinion.

C. The Present Case

In his petition to the District Court, appellant raised the issue of the exclusion of the public during Boyd's testimony. In his opinion denying the writ of habeas corpus, Judge Neaher, although recognizing the probable impropriety of the exclusion, nevertheless refused to challenge the state trial judge's action:

> The colloquy in the record in this case reveals that the trial judge's concern was multi-faceted. His exclusion order was based partly on concern for the welfare of an expectant mother and her unborn child and partly on her own subjective fear of reprisal -- whether reasonable or unreasonable -- if she testified in public. While the record falls short of establishing a real danger to her health or that of her child, or the reasonableness of her fears in terms of actual threats, or even a demonstration in court of her inability to testify publicly, this court is very reluctant to second-guess the trial court's

> discretion on a cold record four years hence. ... In view of the defense objection at trial, the benefits of hindsight and reflection suggest the trial court might have been more circumspect in its decision.... Nevertheless, this court can perceive, under the applicable law, no error of constitutional magnitude indicating a disregard of the trial court's responsibility to conduct a fair and public trial.
>
> (Memorandum and Order, May 30, 1974, at 10-11)

ARGUMENT

THE TOTAL EXCLUSION OF THE PUBLIC FROM THE COURTROOM WAS A CONSTITUTIONAL VIOLATION.

Just prior to the testimony of the primary government witness, Mary Ann Boyd, the Assistant District Attorney made an application requesting total exclusion of the public from the courtroom during Boyd's testimony. The Assistant District Attorney represented that sixteen year old Ms. Boyd was pregnant, that appellant and friends of appellant had allegedly talked to her, and that Boyd was thus afraid to testify.

Without any further inquiry, and over the objection of counsel, the court granted the motion to exclude the public even though only two of the six spectators were known to

appellant. The decision was erroneous, for other alternatives were available to the trial judge which would not have resulted in the total denial of appellant's right to a public trial. United States ex rel. Bennett v. Rundle, 419 F.2d 599, 607 (3d Cir. 1970); United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); Davis v. United States, 247 Fed. 394, 395 (8th Cir. 1917); cf. United States v. Ruiz-Estrella, 481 F.2d 732 (2d Cir. 1973); United States v. Clark, 475 F.2d 240 (2d Cir. 1972); United States v. Bell, 464 F.2d 667 (2d Cir.), cert. denied 409 U.S. 991 (1972).

The Sixth Amendment right to a public trial (Estes v. Texas, 381 U.S. 532, 538-39 (1965); United States ex rel. Bruno v. Herold, 408 F.2d 124 (2d Cir. 1969), cert. denied, 397 U.S. 957 (1970); United States ex rel. Bennett v. Rundle, supra, 419 F.2d at 605-08) has as its purposes the protection against potential abuses of secret proceedings (In re Oliver, 333 U.S. 257, 268-72 (1948)), the restraint of judicial abuse, the exposure of perjured testimony, and the maintenance of public confidence in the judicial system (see United States v. Clark, supra, 475 F.2d at 247).

Exceptions to this important right have been made to protect the defendant (Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, supra, 381 U.S. at 532); to prevent

danger to or harassment of individual witnesses (United States ex rel. Bruno v. Herrold, supra, 408 F.2d at 124); and to preserve order in the courtroom (United States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), cert. denied sub nom. Orlando v. Follette, 384 U.S. 1008 (1966)). Yet even these exceptions must be handled so as to permit the narrowest possible intrusion on the right:

> It has always been recognized that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity. For example, in Kobli, we held that a defendant was deprived of his constitutional right to a public trial because the court, in a prosecution for violation of the Mann Act involving an 18-year old girl, cleared the courtroom of everyone except the defendants, their counsel, witnesses and the press. We held that the court could have excluded youthful spectators for the protection of public morals, but that its sweeping exclusion of the public in general was improper.
>
> In the present case, there was no need to exclude the public after the jury had retired from the courtroom.
>
> United States ex rel. Bennett v. Rundle, supra, 419 F.2d at 607.

This same approach -- that of minimization of the loss of the right -- was taken by this Court in the airport search cases involving the FAA profile. The permissible exclusion of the public was limited to the very specific matter of testimony on the profile: exclusion could not extend to the entire suppression hearing (United States v. Clark, supra) or even to all of the testimony of the witness who revealed the profile (United States v. Ruiz-Estrella, supra).

Here, the total exclusion of the public by the court was unnecessary to accomplish the purpose of protecting Ms. Boyd, should protection have been necessary, and could have been avoided. The prosecutor represented that Boyd had been talked to by appellant and appellant's friends, but added:

> We are not claiming that they threatened her or anything like that, but they consistently said, "You are going to hurt our friend."

It was then established that of the six spectators in the courtroom, three were black; two were known to appellant and one was a courtroom regular. The three other persons were not identified. In order to justify even a limited exclusion of spectators, the judge should have inquired of Boyd who spoke to her (Boyd apparently knew appellant and his friends), how many people spoke to her, whether threats were actually made, and whether appellant's friends talked to Boyd

at appellant's request or on their own volition. At minimum, the judge should have inquired whether Boyd recognized appellant's two friends in the courtroom.

Since the judge made no inquiries whatsoever, total exclusion of the public was unnecessary and improper. The judge could easily have determined whether appellant's two friends in the courtroom had talked to Boyd, and if so, they could have been excluded. Certainly, these were the only spectators who, within the knowledge of the judge, could have posed even a remote threat to Boyd. This principle of specific exclusion of ascertainable persons has been recognized in Davis v. United States, supra, 247 F.2d at 395:

> We appreciate the better position of the trial court to appraise the significance of surrounding conditions, but we cannot avoid the conviction that it acted upon the representations of those who did not adequately realize the great importance of keeping a place where the justice of the nation is judicially administered a public place for the admission of peaceful citizens. An intoxicated man could have been excluded or removed; the aisles and passageways could have been kept clear; when the seats were filled, other spectators could have been denied at the door; if the noise in the lobbies interfered with the proceedings, the lobbies could have been cleared; and individuals whose

> conduct outside the courtroom made their presence within a menace might have been excluded. But it is quite a different thing to exclude the public generally, regardless of their conduct or character.[*]

United States v. Kobli, supra, 172 F.2d at 923.

Even Judge Neaher recognized the impropriety of the total exclusion, but denied issuance of the writ because he wished to avoid a challenge to the state trial judge's authority:

> While the record falls short of establishing a real danger to her health or that of her child, or the reasonableness of her fears in terms of actual threats, or even a demonstration in court of her inability to testify publicly, this court is very reluctant to second-guess the trial court's discretion on a cold record four years hence.
>
> (Memorandum, at 10-11.)

Judge Neaher's deference to the unexplainable whim of the state trial judge was, however, improper. Total exclusion of the public by the trial judge unnecessarily violated appellant's constitutional right to a public trial: that right must take precedence over Judge Neaher's desire not to offend the sensibilities of the state trial judge.

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*This distinguishes United States ex rel. Bruno v. Herrold, supra, and United States ex rel. Orlando v. Fay, supra, where the specific persons threatening the witness could not be isolated.

The circumstances of this case, far from justifying exclusion of the public from the courtroom, warranted the use of an easily applicable alternative. Thus, appellant's constitutional right to a public trial was violated and the conviction must be vacated.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER BELOW SHOULD BE REVERSED AND THE WRIT ISSUED, WITH A DIRECTION TO THE STATE THAT APPELLANT BE RELEASED UNLESS HE IS RETRIED.

Respectfully submitted,

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September , 1974

I certify that a copy of this brief and appendix was served today by mail on the Attorney General, State of New York.

September 20, 1974